Supreme Court, U.S.
FILED

091525 JUN 11 2010

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

LOGAN T. JOHNSTON, III,
Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 North 44th Street
Phoenix, AZ 85018
(602) 235-9510

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Cross-Petitioner

June 11, 2010

QUESTION PRESENTED

A person injured by a willful violation of the automatic stay in a bankruptcy proceeding is entitled to "recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(k)(1). Does the statute authorize recovery of the attorneys' fees incurred in prosecuting the section 362(k)(1) damages action?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

A. Statutory Framework 3

B. Facts and Proceedings Below 4

C. The Ninth Circuit's Decision 7

REASONS FOR GRANTING THE WRIT 8

I. The Courts Are Divided Over What Attorneys' Fees May Be Recovered Where Injury Results From a Willful Violation of the Automatic Stay. 8

II. The Question Presented Is Important. 11

III. The Ninth Circuit's Decision is Wrong. 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Aiello v. Providian Financial Corp.,
239 F.3d 876 (7th Cir. 2001) 15, 16

Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.,
682 F.2d 446 (3d Cir. 1982) 14, 15

In re Bertuccio,
2009 WL 3380605 (Bankr. N.D. Cal. 2009) 11

In re Carrigg,
216 B.R. 303 (B.A.P. 1st Cir. 1998) 9

In re Conti,
42 B.R. 122 (Bankr. E.D. Va. 1984).....10, 15

In re Dawson,
390 F.3d 1139 (9th Cir. 2004) 9

In re Freigo,
149 B.R. 224 (Bankr. M.D. Fla. 1992).....10

In re Johnson,
575 F.3d 1079 (10th Cir. 2009).....9

In re Lehman Brothers Holdings, Inc.,
__ B.R. __,
2010 WL 1783395 (Bankr. S.D.N.Y. 2010) 11

In re Lile,
161 B.R. 788 (Bankr. S.D. Tex. 1993), *aff'd*, 43 F.3d 668 (5th Cir. 1994).....16

In re Lile,
103 B.R. 830 (Bankr. S.D. Tex. 1989) 15

In re Newlin,
29 B.R. 781 (Bankr. E.D. Pa. 1983).....10

In re Pace,
67 F.3d 187 (9th Cir. 1995) 9

In re Price,
42 F.3d 1068 (7th Cir. 1994).....9, 16

In re Price,
143 B.R. 190 (Bankr. N.D. Ill. 1992).....17

In re Repine,
536 F.3d 512 (5th Cir. 2008).....8, 9

In re Roman,
283 B.R. 1, 10 (B.A.P. 9th Cir. 2002).....9, 14

In re Schriver,
46 B.R. 626 (Bankr. N.D. Ohio 1985) 15

In re Sharon,
234 B.R. 676 (B.A.P. 6th Cir. 1999).....17

In re Still,
117 B.R. 251 (Bankr. E.D. Tex. 1990).....8

In re Walsh,
219 B.R. 873 (B.A.P. 9th Cir. 1998).....9, 14

In re Will,
303 B.R. 357 (Bankr. N.D. Ill. 2003) 10, 15

Maritime Electrical Co., Inc. v. United Jersey Bank,
959 F.2d 1194 (3d Cir. 1991) 15

Matter of Gray,
41 B.R. 759 (Bankr. S.D. Ohio 1984).....10

Midlantic National Bank v. New Jersey Department of Environmental Protection,
474 U.S. 494 (1986).....11

Mitchell v. BankIllinois,
316 B.R. 891 (Bankr. S.D. Tex. 2004) 8, 10

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,
456 U.S. 717 (1982).....14

Statutes

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).....4

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).....4

Bankruptcy Reform Act of 1978, Pub. L. No. 95-958, 92 Stat. 2549 (1979), codified at 11 U.S.C § 101, et seq.....3

11 U.S.C. § 330(a)(1) 3

11 U.S.C. § 362(a) 3, 5

11 U.S.C. § 362(h), ... 4

11 U.S.C. § 362(k), ... *passim*

11 U.S.C. § 503(b)(2) 3

11 U.S.C. § 507(a)(1)(C) 3

28 U.S.C. § 1254(1) 2

Legislative History

H.R. Rep. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 ..... 3, 16

Miscellaneous

Richard I. Aaron,
Bankruptcy Law Fundamentals (21st ed. 2000) 11

Bankruptcy Litigation Manual,
(Michael L. Cook ed., 1993) 10

Collier On Bankruptcy
(Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) 10

Alba Conte,
Attorney Fee Awards (3d ed. 2010) 15

Dan B. Dobbs,
Law of Remedies (2d ed. 1993) 14

Barry Glaser,
Understanding the Instant Impact of Steinberg v. Johnston on Attorney Fee Awards for Pursuing Willful Stay Violations in Bankruptcy Cases,
http:// www.execsense.com/details.asp?id =553 12

Andrew Jurs,
Sternberg v. Johnston: 9th Circuit Creates Circuit Split On Attorney Fees,
https://www.lexisnexis.com/Community/Litigation ResourceCenter/blogs/litigation/commentary/ archive/2010/01/12/Sternberg-v.-Johnston 3A00_-9th-Circuit-Creates-Circuit-Split-On-Attorney-Fees.aspx 12

Hon. Joe Lee,
Bankruptcy Service (Lawyers' ed. 2010) 10

Kathleen P. March & Hon. Alan M. Ahart,
Rutter Group Practice Guide: Bankruptcy (2008) ...10

National Bankruptcy Research Center,
December 2009 Bankruptcy Filings Report,
http://www.nbkrc.com/December2009_News .aspx..12

National Bankruptcy Research Center,
March 2010 Bankruptcy Filings Report,
http://www.nbkrc.com/March2010_News. aspx 12

National Bankruptcy Review Commission,
Final Report, Bankruptcy: The Next Twenty Years (1997) 12

Office of the Circuit Executive,
Ninth Circuit: United States Courts 2008 Annual Report, http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf 13

Hon. William L. Norton, Jr.,
Norton Bankruptcy Law and Practice (2010) 10

Robert E. Ginsberg,
Bankruptcy (1985) 10

Benjamin Weintraub & Alan N. Resnick,
Bankruptcy Law Manual (3d ed. 1992).....10

Benjamin Weintraub & Alan N. Resnick,
Bankruptcy Law Manual (1986).....10

Arnold M. Quittner,
Employment and Compensation of Professionals (PLI/Commercial Law and Practice Course, Handbook Series No. 5989 2005) 10

INTRODUCTION

The automatic stay, which is triggered immediately upon the filing of every bankruptcy petition, is a crucial component of the Bankruptcy Code. By safeguarding bankruptcy courts' exclusive jurisdiction, the stay prevents one creditor from gaining an unfair advantage over others. When a bankruptcy estate is injured by a creditor's willful violation of the automatic stay, the Code authorizes the estate to "recover actual damages, including costs and attorneys' fees," incurred as a result of the stay violation. 11 U.S.C. § 362(k)(1).

In the decision below, the Ninth Circuit held that section 362(k) does not authorize the recovery of attorneys' fees incurred in prosecuting the damages action itself. That holding breaks with the overwhelming consensus of courts and commentators, departs from the Ninth Circuit's own prior precedent, and creates an acknowledged split with the Fifth Circuit.

Already, courts have begun to "question the policy analysis underlying that decision." *In re Bertuccio*, 2009 WL 3380605, at *7 n.7 (Bankr. N.D. Cal. 2009). As one bankruptcy court observed, the Ninth Circuit's decision "weakens substantially the effectiveness of the automatic stay. What good is it to be entitled to damages and attorneys' fees for violation of the automatic stay if it costs a debtor much more in unrecoverable attorneys' fees to recover such damages and recoverable attorneys' fees?" *Id.* The decision will inevitably reward overreaching by unscrupulous creditors, disadvantage innocent creditorse, and introduce significant uncertainty into the bankruptcy system nationwide.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 595 F.3d 937. The orders of the district court and bankruptcy court (Pet. App. 25-96) are unreported.[1]

JURISDICTION

The court of appeals entered its second amended opinion on February 8, 2010. The petition for a writ of certiorari in *Sternberg v. Johnston*, No. 09-1374, was filed on May 10, 2010, and placed on this Court's docket on May 12, 2010. This conditional cross-petition is filed pursuant to Supreme Court Rule 12.5. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 362(k) provides:

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

---

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *Sternberg v. Johnston*, No. 09-1374.

STATEMENT

A. Statutory Framework

Through the Bankruptcy Reform Act of 1978, Pub. L. No. 95-958, 92 Stat. 2549 (1979), *codified at* 11 U.S.C § 101, et seq., Congress created a comprehensive legal regime designed to ensure that "all creditors are treated equally" and to facilitate an efficient process that minimizes the "deterioration of the estate in the course of liquidation." H.R. Rep. 95-595, 340, 45 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297, 6006. To that end, Congress granted bankruptcy courts "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." *Id.* at 48.

The principal mechanism for protecting that "broad and complete" jurisdiction is the automatic stay, which is triggered by the filing of a bankruptcy petition. The stay prohibits creditors from taking action—judicial, administrative, or otherwise—to recover or collect from a debtor in bankruptcy. 11 U.S.C. § 362(a). Congress intended the automatic stay to prevent creditors from "acting unilaterally to gain an advantage over other creditors" and "obtain[ing] payment of [their own] claims in preference to and to the detriment of other" valid claims against the debtor. H.R. Rep. 95-595, at 220, 340.

As originally enacted, the Bankruptcy Code granted bankruptcy courts the power to hold creditors that violated the automatic stay in civil contempt. Where courts did not consider contempt sanctions appropriate, the costs and fees incurred in enforcing the stay were allowable administrative expenses of the estate, *see* 11 U.S.C. §§ 330(a)(1), 503(b)(2), and thus treated as first-priority claims against the debtor's estate. *See id.* § 507(a)(1)(C). Because the value of a debtor's estate is finite, such ad-

ministrative expenses effectively decreased the amount recovered by unsecured creditors upon the disposition or liquidation of the estate.

In 1984, Congress amended the Bankruptcy Code to provide that:

> an individual injured by any willful violation of a stay provided by [section 362(a)] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 304, 98 Stat. 333 (1984) (originally codified at 11 U.S.C. § 362(h)). This provision was reenacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 § 305(1)(B), (C), 119 Stat. 23 (2005), and recodified as 11 U.S.C. § 362(k)(1).

When a creditor responsible for a violation of the automatic stay does not voluntarily cure resulting losses, section 362(k) authorizes the debtor estate to initiate an action for damages before the bankruptcy court. To the extent that the resulting award reimburses the estate for losses incurred, including attorneys' fees, section 362(k) insulates innocent secured and unsecured creditors from the costs of the stay violation.

B. Facts and Proceedings Below

Logan Johnston and Paula Parker divorced in 1996. As part of their divorce settlement, Johnston was ordered to make spousal-maintenance payments to Parker. In January 2001, Parker's attorney, Melvin Sternberg, asked an Arizona state court to hold Johnston in contempt for non-payment. Pet. App. 4.

Johnston filed a Chapter 11 petition for bankruptcy on May 14, 2001, triggering the automatic stay, pursuant to 11 U.S.C. § 362(a), of all creditor collection actions outside the bankruptcy forum. Three days later, on May 17, Johnston's bankruptcy attorney notified Johnston's creditors of the petition. That same day, at a state-court hearing on Parker's contempt request, Johnston informed the state court, Parker, and Sternberg of the petition and asked the state court to stay any action against him to the extent that it would interfere with the bankruptcy proceedings. *Id.* at 4-5.

Despite the automatic stay, Sternberg urged the state court to move forward with the contempt proceedings against Johnston. *Id.* at 5. On July 13, the state court issued a minute order holding Johnston in contempt and awarding damages to Parker. The order required Johnston to "pay the judgment by August 1, 2001," or be jailed "until the full amount is paid." *Id.*

Johnston immediately sought relief from the order. He filed a motion for a stay in the state court and wrote to Sternberg requesting that he "take appropriate remedial measures to cure [his] violation" of the automatic stay. *Id.* at 6 (brackets in original). Sternberg took no such action. *Id.*

Because his motion in the state court would not be heard until after the August 1 deadline, Johnston filed a petition asking the Arizona Court of Appeals to stay and vacate the contempt order. Instead of complying with his affirmative obligation under the Bankruptcy Code to cure the stay violation, Sternberg actively pursued the award against Johnston. On Parker's behalf, Sternberg filed and defended a brief opposing Johnston's motion and asked that the contempt order be upheld and enforced. *Id.*

In the meantime, Johnston turned to the bankruptcy court for relief. On July 23, he filed a complaint seeking (1) vacatur of the state-court order and (2) damages incurred as a result of Sternberg's perpetuation of the stay violation, "including attorney's fees necessary to bring this complaint and the motions related to the complaint." Doc. No. 1 at 2, *In re Johnston*, No. B-01-06221 (Bankr. D. Ariz. July 23, 2001).

With respect to the first request, the bankruptcy court concluded that the automatic stay had been violated and vacated the state-court order. Pet. App. 6. With respect to liability for damages, the district court held that both Parker and Sternberg had an affirmative obligation to cure the stay violation. On remand, the bankruptcy court held that Sternberg's perpetuation of the state-court order in spite of that duty constituted a willful violation of the automatic stay. *Id.* at 8.

Before the bankruptcy court issued an award of damages, Johnston and Parker settled, leaving only Sternberg as a defendant. *Id.* After a "painstaking" accounting of Johnston's injuries, *id.* at 31, the court ordered an award of damages in the amount of $92,869.20, including $2,883.20 in lost wages, $20,000 in emotional distress damages, and $69,986 in attorneys' fees, which included fees incurred for prosecuting the adversary proceeding. *Id.* at 8-9.

Sternberg appealed the damages award to the district court, requiring Johnston to incur additional attorneys' fees to defend the award. The district court affirmed, and Sternberg appealed to the Ninth Circuit. *Id.* at 31.

C. The Ninth Circuit's Decision

The Ninth Circuit affirmed in part and reversed in part. After concluding that Sternberg had willfully violated the automatic stay, the court considered the award of attorneys' fees. The court narrowly interpreted section 362(k) to conform to its view of the policy objectives behind the automatic stay and disallowed all of the attorneys' fees incurred in the damages action. *Id.* at 15-24.

Observing that Congress intended "without a doubt" to allow recovery of fees for "work associated with remedying the stay violation," the court found it "less clear" whether Congress intended the same treatment for fees incurred in attempting "to collect damages for the stay violation." *Id.* at 16-18.

The court first rejected the view of its own Bankruptcy Appellate Panel, which had viewed "'actual damages' as requiring an award that returns a debtor to the position he was in before the stay violation occurred." *Id.* at 19. Instead, the court reasoned that the term "actual damages" encompasses only compensation for "the injury resulting from the stay violation itself." *Id.* at 20. Any fees incurred after "the violation has ended," the court reasoned, would not be compensable. *Id.*

The court based its "narrower understanding" of the statute on its view of the "context and goals of the automatic stay." *Id.* The court stated that it would "further neither the financial nor non-financial goals of the automatic stay" to reimburse Johnston for the fees he incurred to recover the actual losses that resulted from Sternberg's violation. *Id.* at 21-22. In particular, the court believed that allowing such fees would impermissibly "aid the debtor in pursuing his creditors," and lead to "[m]ore litigation." *Id.* at 21-22. Although it did "not cre-

ate a circuit split lightly," the Ninth Circuit recognized that the Fifth Circuit had reached a directly contrary holding in *In re Repine*, 536 F.3d 512, 522 (5th Cir. 2008). *Id.* at 23.

Johnston petitioned for rehearing and rehearing en banc. The Ninth Circuit denied the petition. Pet. App. 2.

REASONS FOR GRANTING THE WRIT

I. The Courts are Divided Over What Attorneys' Fees May Be Recovered Where Injury Results From a Willful Violation of the Automatic Stay.

The decision below concludes that 11 U.S.C. § 362(k) does not permit an award of attorneys' fees incurred in an adversarial proceeding to recover damages resulting from a willful violation of the automatic stay. As the Ninth Circuit recognized, its decision is squarely in conflict with a decision of the Fifth Circuit. It is also inconsistent with decisions awarding attorneys' fees and affirming such awards in eight other circuits.

First, the Fifth Circuit has rejected precisely the theory adopted by the Ninth Circuit below. In *In re Repine*, 536 F.3d 512, 522 (5th Cir. 2008), that court affirmed a damages award—including attorneys' fees incurred in the prosecution of the damages action. *Repine* relied on two bankruptcy decisions, *Mitchell v. BankIllinois*, 316 B.R. 891, 901-04 (Bankr. S.D. Tex. 2004), and *In re Still*, 117 B.R. 251, 254-55 (Bankr. E.D. Tex. 1990). *Mitchell* had held that "fees and costs experienced by the injured party" in a damages action "[were] part of the damages resulting directly from the stay violation," 316 B.R. at 904 (citation omitted), while *Still* had held that such fees would be recoverable expenses "so long as" the damages action also sought to recover damages beyond the fees

incurred in the action itself. *Repine*, 536 F.3d at 522. Adopting these readings of section 362(k), the Fifth Circuit concluded that "it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim." *Id.* at 522.

Consistent with the Fifth Circuit's approach, the Seventh and Tenth Circuits have expressly affirmed damages awards that include attorneys fees incurred in pursuit of section 362(k) damages.[2] As the Seventh Circuit explained, such attorneys' fees were appropriately included in the damages award because, had there been no stay violation, there "would have been no need to expend the attorneys' fees and costs." *In re Price*, 42 F.3d 1068, 1074 (7th Cir. 1994).

Likewise, all three Bankruptcy Appellate Panels to consider the matter—in the First, Sixth and Ninth Circuits—have determined that, where a damages action is necessary to vindicate a debtor's rights under the Bankruptcy Code, section 362(k) authorizes fees incurred in connection with that action to "make the injured party ... whole." *In re Walsh*, 219 B.R. 873, 878 (B.A.P. 9th Cir. 1998); *see also In re Roman*, 283 B.R. 1, 10 (B.A.P. 9th Cir. 2002) (debtor is entitled to fees for an adversary proceeding where violator's action forced debtor into court to recover losses); *In re Sharon*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999) (same); *In re Carrigg*, 216 B.R. 303, 306 (B.A.P. 1st Cir. 1998) (same). And bankruptcy

---

[2] *See In re Johnson*, 575 F.3d 1079, 1081-82 (10th Cir. 2009); *In re Price*, 42 F.3d 1068, 1074 (7th Cir. 1994). The Ninth Circuit itself has affirmed awards including fees incurred in pursuing damages. *See In re Dawson*, 390 F.3d 1139, 1152-53 (9th Cir. 2004); *In re Pace*, 67 F.3d 187, 192 (9th Cir. 1995).

courts within the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have awarded fees incurred in damages actions under section 362(k).[3]

Finally, the Ninth Circuit's holding on attorneys' fees is in conflict with the consensus view among bankruptcy scholars and commentators. Before the Ninth Circuit's decision, section 362(k) was uniformly understood to allow recovery of "fees and costs incurred in preparing and prosecuting the § 362(k) motion." Kathleen P. March & Hon. Alan M. Ahart, *Rutter Group Practice Guide: Bankruptcy* § 8:896 (2008).[4] Indeed, in discussing the availability of attorneys' fees under section 362(k), the leading bankruptcy treatises make no distinction between fees incurred to enforce the stay and fees incurred to recover damages resulting from a stay violation. *See, e.g.*, 3 *Collier On Bankruptcy* ¶ 362.11[3] at 362-124 to 362-126.1 (15th ed. rev. 2004); 2 Hon. William L. Norton, Jr., *Norton Bankruptcy Law and Practice* § 43:57 at 43-118 to 43 121 (2010); 1 Robert E. Ginsberg, *Bankruptcy* ¶ 3002 (1985); *Bankruptcy Litigation Manual* 5-72 to 5-75 (1993); 2 Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* ¶ 1.09[10] at 1-50 (1986); 2 Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* ¶ 1.09[10] at 1-64 (3d ed. 1992); Richard I.

---

[3] *See, e.g., Mitchell*, 316 B.R. at 901-04; *In re Will*, 303 B.R. 357, 367 (Bankr. N.D. Ill. 2003); *In re Freigo*, 149 B.R. 224, 284 (Bankr. M.D. Fla. 1992); *In re Conti*, 42 B.R. 122, 128 (Bankr. E.D. Va. 1984); *Matter of Gray*, 41 B.R. 759, 763 (Bankr. S.D. Ohio 1984); *In re Newlin*, 29 B.R. 781, 787 (Bankr. E.D. Pa. 1983).

[4] *Accord* 2B Hon. Joe Lee, *Bankruptcy Service* § 19:1480 (Lawyers ed. 2010); Arnold M. Quittner, *Employment and Compensation of Professionals*, § X(C) (PLI/Commercial Law and Practice Course, Handbook Series No. 5989 2005).

Aaron, *Bankruptcy Law Fundamentals* § 5.05 at 5-38 to 5-40 (21st ed. 2000).

II. The Question Presented Is Important.

This Court has stressed "the importance of § 362(a) in preserving the debtor's estate." *Midlantic Nat'l Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, 503 (1986). Indeed, "[n]othing is more basic to bankruptcy law than the automatic stay and nothing is more important to fair case administration than enforcing stay violations." *In re Lehman Bros. Holdings, Inc.*, __ B.R. __, 2010 WL 1783395, at *8 (Bankr. S.D.N.Y. 2010).

By eliminating much of the economic incentive to redress stay violations, the decision below "weakens substantially the effectiveness of the automatic stay." *Bertuccio*, 2009 WL 3380605, at *7 n.7. If attorneys' fees are not recoverable for a damages action, debtors will be discouraged from seeking redress for stay violations because the cost of pursuing the damages remedy will frequently exceed the amount of damages already incurred. By undercutting debtors' ability to pursue the section 362(k) remedy, the decision below thus undercuts creditors' incentive to comply with the automatic stay. Moreover, even if a debtor were to prosecute a damages action under these circumstances, the costs and legal fees incurred would deplete the value of the estate, thereby further reducing the funds available for distribution to creditors. In this way, the decision below twists a provision intended to preserve the debtors' assets into a mechanism that reduces those assets, to the detriment of both debtors and creditors.

Bankruptcy practitioners and observers have already predicted that the Ninth Circuit's holding will have a significant practical impact on creditors, debtors, trus-

tees, and judges bound by Ninth Circuit precedent.[5] The decision will not only encourage stay violations and leave debtors and creditors unprotected, but will introduce significant uncertainty into the bankruptcy system. That uncertainty has the potential to result in "lengthy litigation" and to "divert the resources of [debtors], depriving all the creditors of a distribution that would otherwise be theirs." 1 National Bankruptcy Review Commission, *Final Report, Bankruptcy: The Next Twenty Years* 708 (1997). That result is contrary to the goals of the automatic stay and the Ninth Circuit's own reasoning.

In the current economic climate, the number of bankruptcy filings has risen substantially. In 2009, there were 1.4 million bankruptcy filings—a 32 percent increase over 2008.[6] The limited data available for 2010 suggests that the rate of bankruptcy filings will continue on this upward trajectory.[7] And in the nine states within the Ninth Circuit, there was a 70 percent increase in bankruptcy filings from 2007 to 2008, driven in part by "the

---

[5] *See, e.g.* Barry Glaser, *Understanding the Instant Impact of Steinberg v. Johnston on Attorney Fee Awards for Pursuing Willful Stay Violations in Bankruptcy Cases*, http://www.execsense.com/details.asp?id=553; Andrew Jurs, *Sternberg v Johnston: 9th Circuit Creates Circuit Split On Attorney Fees*, https://www.lexisnexis.com/Community/LitigationResourceCenter/blogs/litigationcommentary/archive/2010/01/12/Sternberg-v.-Johnston_3A00_--9th-Circuit-Creates-Circuit-Split-On-Attorney-Fees.aspx.

[6] National Bankruptcy Research Center, *December 2009 Bankruptcy Filings Report*, http://www.nbkrc.com/December2009_News.aspx (bankruptcy filings in first quarter of 2010 increased 18 percent over same quarter in 2009).

[7] National Bankruptcy Research Center, *March 2010 Bankruptcy Filings Report*, http://www.nbkrc.com/March2010_News.aspx.

sub-prime mortgage crisis and rising unemployment" that has particularly affected regions in California, Arizona, and Nevada within the Ninth Circuit's jurisdiction.[8] Given the rise in bankruptcy filings and the many creditors dependent on debtor estates, the question presented is a matter of critical importance to the bankruptcy system, and thus worthy of review by this Court.

III. The Ninth Circuit's Decision Is Wrong.

Certiorari is also warranted because the Ninth Circuit's analysis of the attorney-fee issue is wrong. ***First***, the Ninth Circuit misread the plain language of section 362(k)(1), which mandates an award of "actual damages, including costs and attorneys' fees" where the bankruptcy estate is injured by a willful violation of the automatic stay. *See* 2B Hon. Joe Lee, *Bankr. Service* § 19:1449 (Lawyers' ed. 2010). The Ninth Circuit correctly acknowledged that the term "actual damages" encompasses those losses that "result[] from the stay violation itself." Pet. App. 20. But the court, purporting to rely on the American Rule, adopted a "narrower understanding" of "actual damages" as including only those damages incurred while the stay violation is ongoing, excluding losses resulting from the violation but incurred "once the violation has ended." *Id.* That temporal limitation finds no support in the statute's plain language or in this Court's cases discussing the American Rule.

As the Court has explained, "the American Rule presumes that the word 'damages' means damages exclusive of fees." *Summit Valley Indus., Inc. v. Local 112, United*

---

[8] Office of the Circuit Executive, *Ninth Circuit: United States Courts 2008 Annual Report* 49, http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf.

Brotherhood of Carpenters and Joiners of Am., 456 U.S. 717, 722-23 (1982). Thus, when a statute expressly includes attorneys' fees as recoverable damages, "Congress intend[s] to give a broader than normal scope to the term 'damages.'" *Id.* at 723. Accordingly, the phrase "including costs and attorneys fees" in section 362(k)(1) broadens the scope of the term "damages" to include costs and fees. *Walsh*, 219 B.R. at 879 (Ryan, J., concurring); *see also Roman*, 283 B.R. at 10 (holding that attorneys' fees under section 362(k) are "'actual damages,' rather than a separate litigation expense") (citing Dan B. Dobbs, *Law of Remedies* § 3.10(3) and (4), 285-86 (2d ed. 1993)).

To give effect to that broader meaning of "damages," section 362(k) must be read to mandate the recovery of attorneys' fees that "result[] from the stay violation," Pet. App. 20, regardless of whether they are incurred before or after the violation itself has ended. The statute ties the availability of damages to their cause—the stay violation—not to the time at which the damages are incurred.

Second, the Ninth Circuit's narrow construction of "actual damages" relies on the mistaken premise that a damages action is a discretionary action abused by litigious debtors to "pursu[e] [their] creditors" after the harm from the stay violation has ceased. Pet. App. 21-23. Based on that premise, the Ninth Circuit characterized the damages action as "litigation attenuated from the actual bankruptcy, something we do not think Congress intended to promote." *Id.* at 22. In fact, "the automatic stay also provides creditor protection. Without it, [creditors] who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel*

Corp., 682 F.2d 446, 448 (3d Cir. 1982). The stay prevents the "estate from being eaten away ... before the trustee has had a chance to marshall the estate's assets and distribute them equitably among the creditors." *Mar. Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (citation omitted).

Just as the automatic stay protects the assets of the bankruptcy estate, section 362(k) works, in turn, "to protect the rights conferred by the automatic stay." *Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 880 (7th Cir. 2001). The provision accomplishes this end by conferring on innocent creditors and debtors a right to be "made whole," 3 Alba Conte, *Attorney Fee Awards* § 22:3 n.73 (3d ed. 2010), and by mandating the award of "monetary relief necessary to restore [the estate] to the financial position [it] would have occupied" but for a stay violation. *Aiello*, 239 F.3d at 880.

Until the bankruptcy estate is "restore[d] ... to the status quo" following a stay violation, the injury to the estate and its creditor beneficiaries persists. *In re Schriver*, 46 B.R. 626, 630-31 (Bankr. N.D. Ohio 1985). Section 362(k) provides a means of curing the injury and remedying the effects of the stay violation. The action is thus central to, not "attenuated" from, the "actual bankruptcy." Pet. App. 22.

In addition, by forcing "the debtor to resort to the courts to enforce his rights," *Schriver*, 46 B.R. at 630-31, the violator has forced the estate to incur the costs associated with recovery.[9] As such, the Fifth and Seventh Circuits have held that the recovery action is a "compul-

---

[9] *Accord Will*, 303 B.R. at 367; *In re Lile*, 103 B.R. 830 (Bankr. S.D. Tex. 1989); *Conti*, 42 B.R. at 128.

sory counterclaim" to a stay violation because, absent the creditor's proscribed activity, "there would have been no need to expend the attorneys' fees and costs" in pursuit of damages. *Price*, 42 F.3d at 1073; *accord In re Lile*, 161 B.R. 788, 791 (S.D. Tex. 1993), *aff'd*, 43 F.3d 668 (5th Cir. 1994). Because the fees in a damages action "result[] from the stay violation itself," Pet. App. 20, they are recoverable as "actual damages" under the meaning of section 362(k).

Third, the Ninth Circuit's interpretation of section 362(k) is informed by a flawed policy analysis that ignores an animating purpose of the automatic stay—creditor protection. The Ninth Circuit understood the automatic stay to have a "twofold purpose" encompassing both "financial and non-financial goals." Pet. App. 21. In the court's conception, the stay's "financial" goal is to "give[] the debtor time to put his finances back in order" for the benefit of the creditors; its "non-financial" goal is to offer the debtor a "breathing spell" from litigation. *Id.* at 22. Because allowing the recovery of fees incurred in a damages action would further neither of these objectives, the Ninth Circuit reasoned, Congress would not have intended such fees to constitute "actual damages" under the meaning of section 362(k). *Id.* at 20-21.

The court below failed to recognize, however, that "[t]he automatic stay is primarily for the protection of the unsecured creditors as a group." *Aiello*, 239 F.3d at 879. Like the bankruptcy process itself, the stay serves twin goals of efficiency and fairness: "[w]ithout it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." H.R. Rep. 95-595, at 340. Thus, the automatic stay is designed to (1) maximize

creditors' recovery by preserving the debtor estate for their benefit and (2) ensure that similarly situated creditors have equal opportunity to recover on their claims.

Unreimbursed financial losses (including attorneys' fees) that result from a stay violation "place the burden on the bankruptcy estate to absorb the expense." *Sharon*, 234 B.R. at 685-86 (citation omitted). The recovery of losses guaranteed by section 362(k) thus furthers the objectives of the automatic stay by holding the estate harmless for the violation, to maximize the recovery of unsecured creditors. In addition, section 362(k) ensures that a willful violation of the stay does not unfairly disadvantage innocent creditors.

As a practical matter, the Ninth Circuit's interpretation of section 362(k) may thwart creditors' and debtors' ability to recover losses at all. If attorneys' fees are unavailable, a debtor or bankruptcy trustee (with fiduciary obligations to the creditors) might be precluded from bringing suit where the costs of prosecution exceed the injury already incurred. In effect, the availability of the remedy is put in the hands of the violator: A creditor who, through "protracted litigation," "caus[es] the [debtor] to expend much more work," may avoid liability entirely by rendering the recovery action financially untenable. *In re Price*, 143 B.R. 190, 197 (Bankr. N.D. Ill. 1992).

The animating creditor-protective function of the automatic stay counsels against a reading that diminishes innocent creditors' recovery where a willful violator inflicts injury or forces a debtor estate to incur expense through additional litigation. The best reading of section 362(k), and the one most faithful to the goals of the Bankruptcy Code as a whole, is one in which "actual damages" include *all* reasonable attorneys' fees resulting

from the violation, including those incurred to secure the monetary recovery guaranteed by the provision.

CONCLUSION

If the petition for a writ of certiorari in No. 09-1374 is granted, this cross-petition should also be granted.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 N. 44th Street
Phoenix, AZ 85018
(602) 235-9510

Counsel for Cross-Petitioner

June 11, 2010

Supreme Court, U.S.
FILED
AUG 16 2010

No. 09-1525

In The Supreme Court of the United States

LOGAN T. JOHNSTON, III,

Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,

Respondents.

On Cross-Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

DONALD B. AYER
JONES DAY
51 Louisiana Avenue N.W.
Washington, DC 20001
(202) 879-4689

Co-Counsel for Respondents

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5756
sfreeman@lrlaw.com

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Cross-petitioner incurred thousands of dollars in attorneys' fees when prosecuting a damages action under 11 U.S.C. § 362(h), now § 362(k)(1), for an automatic stay violation. Nearly all of the fees were incurred after cross-respondent had ceased violating the stay. Does 11 U.S.C. § 362(h)[1] abrogate the American Rule by permitting an award of attorneys' fees charged for litigating a damages claim, when the statute provides only for "actual damages" resulting from a stay violation?

---

[1] Section 362(h) of the Bankruptcy Code was renumbered as Section 362(k)(1) but otherwise unchanged in 2005. Pub. L. 109-8 § 305(1)(B), (C). The actions at issue took place before the amendment. To avoid confusion, Section 362(h) is used for all section references in this brief in opposition to the cross-petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS TO DENY THE WRIT 2

1. The Issue Presented In The Cross-Petition Is Not Final And Not Ripe For Review 2

2. The Split In The Circuits Involves Only One Other Circuit, Which Did Not Even Analyze The Question Presented 6

3. The Ninth Circuit Was Correct On This Issue And Other Circuits Need The Opportunity To Fully Consider It 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 11

Am. Constr. Co. v. Jacksonville, T. & K. Ry. Co., 148 U.S. 372 (1893) 4

Am. Society for Testing & Materials v. Corrpro Cos., 478 F.3d 557 (3d Cir. 2007) 5

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 5, 6, 8, 14

Business Guides, Inc. v. Chromatic Communs. Enters., Inc., 498 U.S. 533 (1991) 13

Cal. Nat'l Bank v. Stateler, 171 U.S. 447 (1898) 4

In re Carrigg, 216 B.R. 303 (B.A.P. 1st Cir. 1998) 10

Catlin v. United States, 324 U.S. 229 (1945) 2

In re Conti, 42 B.R. 122 (Bankr. E.D. Va. 1984) 9

Cooper v. Salamon Bros., 1 F.3d 82 (2d Cir. 1993) 5

Cooter & Gell v. Hartmax Corp., 496 U.S. 384 (1990) 13, 14

F.D. Rich Co. v. U.S. for the Use of Indus. Lumber Co., 417 U.S. 116 (1974) 12

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 12

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 12

TABLE OF AUTHORITIES – Continued

Page

In re Freigo, 149 B.R. 224 (Bankr. M.D. Va. 1992) 10

In re Gray, 41 B.R. 759 (Bankr. S.D. Ohio 1984) 9

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) 5

Hardt v. Reliance Std. Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149 (2010) 11, 12

Hughes Tool Co. v. Trans-World Airlines, Inc., 409 U.S. 363 (1973) 5

In re Johnson, 575 F.3d 1079 (10th Cir. 2009) 6, 8, 9, 13

Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) 2

Lockary v. Kayfetz, 974 F.2d 1166 (9th Cir. 1992) 14

Mann v. Chase Manhattan Mortg. Corp., 316 F.3d 1 (1st Cir. 2003) 13

McCarter v. Ret. Plan for the Dist. Mgrs. of the Am. Family Ins. Group, 540 F.3d 649 (7th Cir. 2008) 5

McLean v. United States, 566 F.3d 391 (4th Cir. 2009) 8

Mitchell v. BankIllinois, 316 B.R. 891 (S.D. Tex. 2003) 7

In re Newlin, 29 B.R. 781 (Bankr. E.D. Pa. 1983) 9

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 8

In re Price, 42 F.3d 1068 (7th Cir. 1994) 6, 8, 9

In re Repine, 536 F.3d 512 (5th Cir. 2008) 6, 7, 8

Riley v. Kennedy, 553 U.S. 406, 128 S. Ct. 1970 (2008) 2

In re Roman, 283 B.R. 1 (B.A.P. 9th Cir. 2002) 3, 10

In re S. Cal. Sunbelt Dev., Inc., 608 F.3d 456 (9th Cir. 2010) 13

In re Sharon, 234 B.R. 676 (B.A.P. 6th Cir. 1999) 10

In re Still, 117 B.R. 251 (Bankr. E.D. Tex. 2000) 3, 7

Summit Valley Indus. v. Local 112, United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982) 12

United States v. Gracidas-Ulibarry, 231 F.3d 1188 (9th Cir. 2000) 8

United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952) 8

Va. Military Inst. v. United States, 508 U.S. 946 (1993) 4

In re Walsh, 219 B.R. 873 (B.A.P. 9th Cir. 1998) 10

Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 4

TABLE OF AUTHORITIES – Continued

Page

Webster v. Fall, 266 U.S. 507 (1925) 8

Wrotten v. New York, ___ U.S. ___, 130 S. Ct. 2520 (2010) 3

RULES, REGULATIONS AND STATUTES

Federal Rules of Civil Procedure:

Rule 11 13

United States Code:

11 U.S.C. § 106(a) 8

11 U.S.C. § 362(h) .....*passim*

28 U.S.C. § 1291 5

28 U.S.C. § 2412 9

OTHER AUTHORITIES

3 Alba Conte, *Attorney Fee Awards* § 22:3 n.73 (3d ed. 2010) 11

INTRODUCTION

Bankruptcy Code Section 362(h) provides that "an individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees." It does not provide for a recovery of damages "and" attorneys' fees. Debtors commonly need attorneys to communicate with creditors and sometimes even sue to stop creditor stay violations, and their damages "include" attorneys' fees incurred in that effort. In the opinion below, the Ninth Circuit appropriately held that Section 362(h) covers only fees charged for correcting a stay violation, and does not authorize attorneys' fees that are incurred in prosecuting a damages action after the automatic stay violation has stopped. *See* Pet. App. at 22-23.

The Ninth Circuit remanded for the bankruptcy court to determine the amount of attorneys' fees payable. The fee portion of the Ninth Circuit's decision is therefore unripe because it is not final, unlike the emotional distress damages award at issue in the petition for certiorari. Information about the amount of attorneys' fees is important to the Court's understanding of how Section 362(h) operates as a practical matter. The record in this case on the fee award issue is not sufficiently developed to enable the Court to render a fully considered opinion on the fee issue.

Not only is the case itself not ready for review, the circuit split over this issue identified in the cross-petition is overstated and certiorari would be

premature. Two of the three circuit-level cases that the cross-petition cites do not even mention the issue, and the third merely adopted two lower court opinions without analysis. The Ninth Circuit's opinion below provides the only comprehensive discussion of the meaning of Section 362(h)'s reference to attorneys' fees, and it applies the American Rule in accord with this Court's cases distinguishing attorneys' fees as sanctions or damages from true fee-shifting statutes. Contrary to the assertions made by cross-petitioner, the jurisprudence and commentary on the question presented are still in their infancy. This issue is best left to percolate in the lower courts.

REASONS TO DENY THE WRIT

1. The Issue Presented In The Cross-Petition Is Not Final And Not Ripe For Review.

A "final decision" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The Ninth Circuit's ruling on attorneys' fees is not final because it leaves unanswered the amount of attorneys' fees to be awarded. *See Riley v. Kennedy*, 553 U.S. 406, ___, 128 S. Ct. 1970, 1981 (2008) ("[A]n order resolving liability without addressing a plaintiff's requests for relief is not final."); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976). It is thus difficult to assess consequences for the parties of the Ninth Circuit's fee

ruling in terms of fees allowed and fees denied. If it takes review now, the Court will undertake to review the question presented in the abstract, disembodied from its application to the facts of the case. *See Wrotten v. New York*, ___ U.S. ___, ___, 130 S. Ct. 2520, 2521 (2010) (statement of Sotomayor, J., respecting the denial of certiorari) (noting that if the Court reviewed case that had been remanded for further factual determination, the Court would lose the benefit of the full consideration of the lower courts).

The bankruptcy court's assessment of how much of its $69,000 attorneys' fee award is attributable to correcting the stay violation and how much relates to litigation of the damages action will inform this court's understanding of how Section 362(h) functions in practice. If, as expected, the pre-correction portion is small, it will highlight the potential for abuse if the Court accepted cross-petitioner's argument. *See In re Still*, 117 B.R. 251, 254 (Bankr. E.D. Tex. 2000) (noting vast disparity between amount of attorneys' fees requested and alleged actual damages, and stating that "Debtor's prosecution of a *de minimis* violation of the stay should not be ennobled by [an] award of attorney's fees"); *In re Roman*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002) (same). Without this information, the Court must speculate as to how Section 362(h) fees motivate attorneys and debtors. The Court cannot look to other cases for guidance, because, as explained below, the case law is as barren as the record is here.

These kinds of concerns form the backdrop for this Court's long-standing rule that petitions for certiorari are not ripe for review when further proceedings on remand lie ahead. *See, e.g.*, *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari, and noting that where the court of appeals had remanded the case for determination of an appropriate remedy, certiorari was not yet appropriate, and that the petitioner could raise the same issues in a later petition after final judgment had been rendered); *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (granting certiorari on issue after previously denying certiorari, and noting that previous denial "came at an interlocutory stage in the proceedings" because the district court had retained enforcement jurisdiction over the case); *Cal. Nat'l Bank v. Stateler*, 171 U.S. 447, 449 (1898) ("[I]f a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a . . . subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final."); *Am. Constr. Co. v. Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

The Ninth Circuit's decision is final with respect to the emotional distress damages award at issue in the petition for certiorari, which was fixed at a sum certain and is subject to review by this Court now. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) ("[A]n unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."). However, the attorneys' fees part of the decision is subject to bifurcation, not final, and can be considered later, after the fee record is fully developed. *See id.* at 201-02; *Hughes Tool Co. v. Trans-World Airlines, Inc.*, 409 U.S. 363, 365-66 n.1 (1973); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968). Appellate courts may hear the merits portion of an appeal, and decline to hear the attorneys' fees portion when the attorneys' fees are not quantified. *See Am. Society for Testing & Materials v. Corrpro Cos.*, 478 F.3d 557, 580 (3d Cir. 2007) (noting that this is the "inescapable" conclusion to be drawn from *Budinich*); *cf. McCarter v. Ret. Plan for the Dist. Mgrs. of the Am. Family Ins. Group*, 540 F.3d 649, 652-53 (7th Cir. 2008) (addressing merits and dismissing portion of appeal relating to attorneys' fees because fees were unquantified); *Cooper v. Salamon Bros.*, 1 F.3d 82, 85 (2d Cir. 1993) (same).

Budinich's holding – that an unresolved attorneys' fee issue does not render the decision non-final – involved application of 28 U.S.C. § 1291, which governs only appeals to the courts of appeal, but the Court recognized that it had applied the same

principle to its own cases. 486 U.S. at 201-02 (noting this Court's willingness to "split the 'merits'"). This makes good sense, because the rationale for the rule is that claims for attorneys' fees are "collateral" to the merits because they "do[ ] not remedy the injury giving rise to the action." *Id.* 200. Importantly, for purposes of this case, the fact that attorneys' fees are statutorily authorized does not convert the action into one on the merits. *Id.* at 201 (noting that for purposes of finality, "an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them").

Thus, the Court should deny the cross-petition because the development of the record on attorneys' fees is important for the Court to make a fully informed decision. This does not impede review of the petition for certiorari, because the attorneys' fees portion of the case is severable from the emotional distress issue raised in the petition.

2. The Split In The Circuits Involves Only One Other Circuit, Which Did Not Even Analyze The Question Presented.

Cross-petitioner cites three cases as evidence of a circuit split, *In re Johnson*, 575 F.3d 1079 (10th Cir. 2009); *In re Repine*, 536 F.3d 512 (5th Cir. 2008); and *In re Price*, 42 F.3d 1068 (7th Cir. 1994).

Cross-petitioner is correct that the Fifth Circuit held in *Repine* that attorneys' fees for prosecuting

a Section 362(h) damages action are available. But *Repine* simply adopted, without explanation, the reading of Section 362(h) by two lower courts: *Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2003), and *In re Still*, 117 B.R. 251 (Bankr. E.D. Tex. 2000). *See Repine*, 536 F.3d at 522. *Repine* cited *Still* only for the proposition that "a debtor could collect attorneys' fees incurred in prosecuting a stay violation." *Repine*, 536 F.3d at 522. *Still* is in accord with the Ninth Circuit's fee ruling because the *Still* court declined to award *any* attorney's fees given the absence of actual damages. *Still*, 117 B.R. at 254. *Still* noted that awarding attorneys' fees for prosecuting damages actions can be the equivalent of "killing an ant with an elephant gun" when other damages are small. *Id.* The bankruptcy court in *Mitchell* awarded attorneys' fees as part of the same judgment that corrected a stay violation by ordering turnover of the debtor's wrongfully retained property. 316 B.R. at 895. This is consistent with the Ninth Circuit's fee ruling in the decision below because the stay violation had not stopped at the time the judgment was entered. *See* Pet. App. at 20 (noting that "actual damages" only cease accruing "[o]nce the violation has ended"). *Mitchell* also approved attorneys' fees for work done in resisting a creditor's appeal, but without analysis. 316 B.R. at 904.

Thus, *Repine* rests on a dubious, unexamined foundation. Even though *Repine* ruled on the question presented in this case, it may well prove unpersuasive to other courts of appeals for that reason. *See*,

e.g., *McLean v. United States*, 566 F.3d 391, 398 (4th Cir. 2009) (rejecting Tenth Circuit opinion that performed no analysis to support its holding); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1195 (9th Cir. 2000) (rejecting Eleventh Circuit opinion that performed no analysis and merely adopted an unpublished First Circuit opinion); *see also* Pet. App. at 23 (lack of legal analysis warranted not following *Repine*).

Neither *Price* nor *Johnson* address the question presented, even implicitly, and a point of law that is not discussed in an opinion is not authoritative. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 & n.29 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1925); *Cf. Budinich*, 486 U.S. at 201 (acknowledging that a previous decision of this Court implicitly supported Petitioner's argument, but rejecting that argument when it was "squarely presented").

In *Price*, the Internal Revenue Service had violated the automatic stay. 42 F.3d at 1069-70. The Seventh Circuit analyzed whether the United States had waived sovereign immunity under 11 U.S.C. § 106(a). *Id.* at 1071. The cross-petition here quotes a passage from *Price* stating that if there had been no stay violation, there "would have been no need to expend the attorneys' fees and costs." Cross-pet. at 9 (quoting *Price*, 42 F.3d at 1074). But *Price* did not address whether attorneys' fees were "actual damages" under Section 362(h). The context of that

statement was an evaluation of whether the debtor's claim against the government for violation of the stay "arose out of the same transaction or occurrence" as the IRS' claim against the debtor for unpaid taxes. 42 F.3d at 1072-73.

Johnson concerned whether dismissal of the underlying bankruptcy case divested the court of jurisdiction over a stay violation adversary proceeding. 575 F.3d at 1081. The Tenth Circuit expressly declined to review the method used for determining the amount of the fees because the issue had been waived. *Id.* at 1085-86.

The lower court decisions cited by cross-petitioner suffer from the same lack of analysis. Three of those cases do not even cite Section 362(h). *See In re Newlin*, 29 B.R. 781, 787 (Bankr. E.D. Pa. 1983); *In re Conti*, 42 B.R. 122 (Bankr. E.D. Va. 1984); *In re Gray*, 41 B.R. 759 (Bankr. S.D. Ohio 1984). Instead, *Newlin* and *Conti* applied the Equal Access to Justice Act, 28 U.S.C § 2412, and *Gray* relied on "contempt" powers. *See Newlin*, 29 B.R. at 787; *Conti*, 42 B.R. at 128-29; *Gray*, 41 B.R. at 763. Moreover, the stay violation in *Gray* appears to have continued until the entry of the court's order awarding attorneys' fees because the creditor apparently did nothing to rectify the entry of the contempt order in state court that violated the stay. 41 B.R. at 761-62. Thus, *Gray* does not conflict with the decision below.

The rest of the lower court cases cited by cross-petitioner do cite Section 362(h), but do not discuss,

much less decide, the question presented in this case. And in several of these cases, the award of attorneys' fees was part of the same order that mandated correction of the automatic stay violation. *See In re Carrigg*, 216 B.R. 303, 306 (B.A.P. 1st Cir. 1998); *In re Sharon*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999); *In re Freigo*, 149 B.R. 224, 284 (Bankr. M.D. Va. 1992). Thus, the stay violations had not ceased at the time the attorneys' fees were awarded. The fees were incurred in remedying the stay violations, and would be included as damages under the decision below.

The only cases cited by cross-petitioner providing a hint of consideration that could bear on the question presented are *In re Roman*, 283 B.R. 1 (B.A.P. 9th Cir. 2002), and *In re Walsh*, 219 B.R. 873 (B.A.P. 9th Cir. 1998). These lower court cases are no longer good law, since they arose within the Ninth Circuit and reflect the development of the law there, which has culminated in the decision now before this Court.

Cross-petitioner cites sundry treatises and other authorities for the proposition that there is a "consensus" among scholars and commentators supporting his position. Cross-pet. at 10. All of the authorities cited, save one, suffer from the same problem as the case law – there is no examination of the issue. Cross-petitioner recognizes as much, stating that "the leading bankruptcy treatises make no distinction between fees incurred to enforce the stay and fees incurred to recover damages resulting from a stay violation." *Id.* There is no distinction because the issue is not addressed. The Conte treatise is the only

scholarly work cited by cross-petitioner that analyzes Section 362(h), and it addresses a point only tangentially relevant here – whether attorneys' fees incurred in defending against an appeal of a judgment finding liability under Section 362(h) are available. *See* 3 Alba Conte, *Attorney Fee Awards* § 22:3 n.73 (3d ed. 2010). This is no consensus.

While the cross-petition cites many cases, to borrow from Gertrude Stein, there is no there there. Cross-petitioner finds support in implications from its authorities, not from any reasoned analysis. In the vast majority of the cases, the issue was not even brought to the courts' attention. Given the lack of a fully developed division in the case law, this Court should deny the cross-petition, as it is likely that this issue will resolve itself in the lower courts over time.

3. The Ninth Circuit Was Correct On This Issue And Other Circuits Need The Opportunity To Fully Consider It.

The opinion below is in accord with this Court's case law. The Court has repeatedly approached potential fee-shifting statutes by beginning with the "bedrock principle" of the American Rule, which requires each side to bear its own attorneys' fees. *See Hardt v. Reliance Std. Life Ins. Co.*, ___ U.S. ___, ___, 130 S. Ct. 2149, 2156-57 (2010); *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). The Ninth Circuit began there as well. *See* Pet. App. at 16 (applying American Rule). Deviations from the

American Rule must be clearly shown from the text of the statute. *Hardt*, 130 S. Ct. at 2156-57; *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533-34 (1994) (departures from the American Rule should draw "explicit statutory language and legislative comment"); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720 (1967) ("When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."), *superseded by statute on other grounds*, 15 U.S.C. § 1117(a). The decision below makes clear that the only thing that is explicit in Section 362(h) is that debtors may recover attorneys' fees incurred in stopping a violation of the automatic stay. Beyond that, there is nothing in the statutory language, and the legislative history is silent on the issue of attorneys' fees.

The root of cross-petitioner's argument on the merits is that debtors will not be "made whole" if Section 362(h) is not construed to include attorneys' fees incurred in prosecuting a damages action. Cross-pet. at 15. But this is merely a criticism of the American Rule. *See Summit Valley Indus. v. Local 112, United Brotherhood of Carpenters & Joiners*, 456 U.S. 717, 725 (1982); *F.D. Rich Co. v. U.S. for the Use of Indus. Lumber Co.*, 417 U.S. 116, 128-31 (1974), *superseded by statute on other grounds*, 31 U.S.C. § 3905(j). An award of compensatory damages is generally sufficient to protect the rights of an aggrieved party. *See Summit Valley*, 456 U.S. at 724.

The Ninth Circuit's understanding of Section 362(h) is also consistent with this Court's holdings in *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990), and *Business Guides, Inc. v. Chromatic Communs. Enters., Inc.*, 498 U.S. 533 (1991), which distinguish "sanctions" or "damages" fee statutes from fee-shifting statutes. In *Cooter & Gell*, the Court rejected the argument that Federal Rule of Civil Procedure 11 provided for attorneys' fees on appeal because the Rule provided for all "expenses incurred because of the filing of the" offending paper.[1] 496 U.S. at 406. Rather, Rule 11 does not extend liability indefinitely, and provides only for those expenses "directly caused" by the filing. *Id.* at 406. Fees incurred on appeal are not directly caused by the filing, but rather are caused by "the district court's sanction and the appeal of that sanction." *Id.* at 407. In *Business Guides*, the Court noted that Rule 11 was not a fee-shifting statute, but a sanctions statute. 498 U.S. at 553. Sanctions statutes "do not shift the entire cost of litigation; they shift only the cost of a discrete event." *Id.* Courts routinely refer to Section 362(h) as providing for "sanctions." *See, e.g.*, *In re Johnson*, 575 F.3d at 1081 n.2 (10th Cir. 2009); *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003); *see also In re S. Cal. Sunbelt Dev., Inc.*, 608 F.3d 456, 464 (9th Cir. 2010) (noting that the decision below is premised on the fact that Section 362(h) is a "damages" statute,

---

[1] The text of Rule 11 has changed since the Court decided *Cooter & Gell*, but the reasoning in that case is still apt.

not a fee-shifting statute, and stating: "The distinction here is between those statutes which permit recovery of attorney's fees as damages, and which are therefore consistent with the American Rule, and those which permit the recovery of attorney's fees *qua* attorney's fees and therefore create an exception to the American Rule." (internal quotation marks and citations omitted)).

Cross-petitioner makes the same argument as the unsuccessful petitioner in *Cooter & Gell*, – *i.e.* any attorneys' fees that result from a violation of the automatic stay are compensable, no matter how attenuated from the violation. But attorneys' fees incurred in litigation to recover damages are a direct result of the bankruptcy court's decision to award sanctions, not a direct result of the violation itself, because the "discrete event" of the violation has ended. *See Budinich*, 486 U.S. at 200 (attorneys' fees are typically "collateral" to the merits and "do| |not remedy the injury giving rise to the action"); Pet. App. at 22 (noting that prosecution of a Section 362(h) damages action is "attenuated from the actual bankruptcy"); *Lockary v. Kayfetz*, 974 F.2d 1166, 1177-78 (9th Cir. 1992) (holding that under *Cooter & Gell* a party is not entitled to attorneys' fees for preparing and supporting a motion for sanctions under Rule 11 because those fees are not "direct" costs). Had Congress intended the result that Cross-Petitioner advocates, it would have provided for "actual damages *and* attorneys' fees," not "actual damages, *including* attorneys' fees."

Debtors often involve attorneys in correcting stay violations. Creditors may refuse to turn over property of the estate or continue collection activities such as making telephone calls or sending dunning letters. Congress recognized that attorneys' fees incurred in stopping such creditor may be part of a debtor's damages and authorized damages awards that include fees in Section 362(h). That does not undercut the applicability of the American Rule to attorneys' fees incurred while prosecuting a Section 362(h) damages action. Other circuit courts are likely to agree with the Ninth Circuit's fee ruling when they fully analyze the issue. The Court should not review attorneys' fees under Section 362(h) until and unless a meaningful circuit split arises after courts consider and adopt or criticize and alter the Ninth Circuit's analysis.

CONCLUSION

While the petition for certiorari should be granted, the contingent cross-petition should be denied.

Respectfully submitted,

SUSAN M. FREEMAN
Counsel of Record
LAWRENCE A. KASTEN
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5756

MICHAEL W. CARMEL
MICHAEL W. CARMEL, LTD.
80 East Columbus
Phoenix, Arizona 85012
(602) 264-4965

Counsel for Respondents

DONALD B. AYER
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001
(202) 879-4689

Co-Counsel for Respondents

Supreme Court, U.S.
FILED
AUG 31 2010
OFFICE OF THE CLERK

No. 09-1525

IN THE

Supreme Court of the United States

LOGAN T. JOHNSTON, III,
Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 North 44th Street
Phoenix, AZ 85018
(602) 235-9510

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Cross-Petitioner

August 31, 2010

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI

Petitioners and Cross-Respondents Melvin Sternberg and his law firm Sternberg and Singer (collectively, "Sternberg") have asked this Court to review the question whether damages for emotional distress resulting from stay violations are recoverable under 11 U.S.C. § 362(k)(1). As explained in our brief in opposition, Sternberg's request should be denied because that question was neither raised nor decided below and implicates no circuit split on these facts.

If the Court decides to grant Sternberg's petition, however, it should also grant our conditional cross-petition, which raises the question whether the same statutory provision authorizes the recovery of attorneys' fees incurred in prosecuting damages actions for violations of the automatic stay. Unlike the emotional-distress issue, the Ninth Circuit's attorney-fees holding was central to the opinion below, is indisputably important, represents a clean break with the consensus view of courts and commentators, and has already been a target of criticism from several quarters.

Notably, Sternberg does not attempt to deny the existence of a clear circuit split on the fees question. Nor does Sternberg deny that the Ninth Circuit's fees ruling will encourage stay violations, leave debtors and creditors unprotected, and introduce significant uncertainty into the bankruptcy system nationwide.

Instead, Sternberg argues that (1) the fees question is not ripe because the district court has yet to implement the Ninth Circuit's ruling on remand, (2) the circuit split over the fees question does not squarely implicate more than two circuits, and (3) the Ninth Circuit, in his

view, was correct on the merits. If the Court decides to grant Sternberg's petition, none of these reasons would justify denial of the conditional cross-petition.

1. Despite the acknowledged circuit split, Sternberg argues that the Court should deny the cross-petition because the district court has yet to perform the ministerial task of implementing the Ninth Circuit's fees ruling on remand. That argument erroneously conflates jurisdictional and discretionary notions of finality. Virtually all of the cases that Sternberg cites involve either 28 U.S.C. § 1291, which governs the jurisdiction of the courts of appeals, or 28 U.S.C. § 1257(a), which imposes a strict finality requirement, animated by federalism and comity concerns, on cases that come to this Court from the *state* courts. *See, e.g.*, BIO 3 (citing *Wrotten v. New York*, 130 S. Ct. 2520 (2010)).

By contrast, this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam). Because the Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals," the posture of a case is relevant only to the extent that it affects the Court's assessment of whether review is appropriate. Gressman, et al., *Supreme Court Practice* § 4.18, at 281 (9th Cir. 2007). Here, if the Court grants certiorari to decide the emotional-distress issue, then the principal reason justifying the denial of certiorari in interlocutory cases—the risk that judicial resources will be wasted on a case that might otherwise have been resolved below, *id.* at 283—will fall away.

In any event, the interlocutory posture of a case coming from a federal appeals court typically does not preclude review where, as here, "there is some important

and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." *Id.* Faced with a clear-cut issue of law concerning the availability of attorneys' fees under 11 U.S.C. § 362(k)(1), Sternberg does not explain why the procedural posture here poses any special obstacle to review. Sternberg says only that an "assessment of how much of [the] $69,000 fee award is attributable to correcting the stay violation and how much relates to litigation of the damages action will inform this [C]ourt's understanding of how Section 362[(k)(1)] functions in practice." Sternberg BIO 3. But it is not apparent why the Court's interpretation of the text, structure, and purpose of the statute should be affected by the specific amounts at issue in this case. In any event, the fee application filed in the bankruptcy court, together with the bankruptcy court's "painstaking" accounting of "each individual billing entry," provides more than enough information to answer Sternberg's question. App. 31; *see also* App. 62-78 (setting forth and analyzing billing invoices).

In past cases, this Court has had no trouble interpreting fees statutes where the lower courts had not yet made an award or an assessment of the amount of the fees in question. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008); *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991). Indeed, in the landmark attorneys' fees case of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court reviewed a decision in which the court of appeals had remanded to the district court for an assessment of fees.

2. Sternberg concedes that the Fifth Circuit, in direct conflict with the Ninth Circuit, has held that attorneys' fees for prosecuting a damages action are recover-

able under Section 362(k)(1). BIO 6. The circuit split is direct, acknowledged, and unlikely to be resolved absent intervention by this Court. The Ninth Circuit, by its own account, did "not create a circuit split lightly." App. 23.

Nevertheless, Sternberg argues that the cross-petition should be denied because the split does not encompass more circuits. But as explained in our cross-petition, the Ninth Circuit's decision also runs contrary to the established past practice in most of the circuits, which have routinely affirmed fee awards that would be precluded under the decision below, as well as the consensus view among courts and commentators. Cross-Pet. 9-10. Sternberg points out that the leading bankruptcy treatises understandably have not yet analyzed the Ninth Circuit's novel interpretation of the statute, but does not deny that the treatises make no distinction between fees *incurred to enforce* the stay and fees *incurred* to recover damages resulting from a stay violation.

Most important, Sternberg makes no attempt to deny the immediate impact of the circuit split. Sternberg has no answer to the fact that "[b]ankruptcy practitioners and observers have already predicted that the Ninth Circuit's holding will have a significant practical impact on creditors, debtors, trustees, and judges bound by Ninth Circuit precedent"—the circuit with the most bankruptcy filings. Cross-Pet. 11-12. Similarly, Sternberg does not deny that the open disagreement between the Fifth and Ninth Circuits will introduce significant uncertainty into the bankruptcy system nationwide: Debtors, creditors, and practitioners in California and Texas will face drastically different incentives going forward, and courts in New York and Illinois will be forced to choose between the two regimes. In a national bankruptcy system designed to foster both "predictability and

uniformity," *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997), that situation is intolerable.

3. In our view, the decision below is inconsistent with the text, structure, and purpose of 11 U.S.C. § 362(k)(1). Sternberg, echoing the Ninth Circuit's policy arguments, disagrees. The cross-petition and opposition reveal the parties' very different understandings of the law and the practical importance of the question presented. If the Court grants the cross-petition, there will be time enough to respond to Sternberg's merits arguments in detail. For present purposes, the depth of the parties' disagreement on the merits only mirrors the split between courts and commentators and underscores the need for review.

CONCLUSION

If the petition for a writ of certiorari in No. 09-1274 is granted, this cross-petition should also be granted.

Respectfully submitted,

RONALD J. ELLETT
ELLETT LAW OFFICES
2999 N. 44th Street
Phoenix, AZ 85018
(602) 235-9510

DEEPAK GUPTA
Counsel of Record
ADINA H. ROSENBAUM
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
Washington, DC 20009
(202) 588-1000
dgupta@citizen.org

Counsel for Cross-Petitioner

August 31, 2010